IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

~~No. 1549~~ 70-112

JAMES E. GROPPI,
Petitioner,

v.

JACK LESLIE, Sheriff of
Dane County,
Respondent.

No. 1549

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

On October 1, 1969, the State Assembly of Wisconsin passed a resolution reciting that petitioner Groppi had led a gathering of people onto the floor of the Assembly two days earlier (September 29, 1969) and that petitioner's conduct in so doing violated an Assembly rule and prevented the Assembly from conducting its business. The resolution found that petitioner's conduct constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and further found the petitioner

to be in contempt of the Assembly, said contempt being punishable by the Assembly under Article IV, Section 8 of the Wisconsin Constitution and sec. 13.26 (1) (b) of the Wisconsin Statutes. Petitioner Groppi was arrested on the same day the resolution was passed and imprisoned in the Dane County, Wisconsin, jail pursuant to the direction of the resolution that he be imprisoned for a period of six months or for the duration of the then current session of the legislature, "whichever is briefer."

The contempt resolution was passed and carried into execution without formal notice served on the petitioner and without his presence at or participation in any of the proceedings of the Assembly leading thereto.

Within forty-eight hours after his arrest and confinement, petitioner commenced a civil action in the United States District Court for the Western District of Wisconsin for a declaratory judgment of the constitutionality of Wisconsin Statutes, secs. 13.26 and 13.27, pursuant to which the Assembly had acted in imprisoning him for contempt. He sought a temporary restraining order in connection therewith, the effect of which would be to release him from confinement pending determination of the merits of the declaratory judgments action.

On Monday, October 6, 1969, the District Court denied the motion for a temporary restraining order on the ground that it would be the equivalent of a writ of habeas corpus which the District Court had no power to issue before petitioner's state remedies had been exhausted. On the same day, a petition for a writ of habeas corpus in petitioner's behalf was filed in Dane County Circuit Court, which ordered the filing of a response and a hearing on the issues the following morning, Tuesday, October 7. Following the hearing in Circuit Court, the matter was taken under advisement; petitioner's

attorneys filed a petition for bail and for leave to commence an original action for a writ of habeas corpus in the Wisconsin Supreme Court without waiting for the determination of the Circuit Court.

On Wednesday, October 8, 1969, the Dane County Circuit Court entered an opinion and order denying the petition therein for a writ of habeas corpus and petitioner's attorneys on the same day filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Wisconsin. The District Court immediately issued an order requiring a response to the petition to be filed within three days, even though the Wisconsin Supreme Court had not yet heard arguments.

On Friday, October 10, 1969, the Wisconsin Supreme Court, having earlier granted petitioner leave to amend his petition for a writ of habeas corpus in that court, heard oral arguments on the petition and took the case under advisement. Later in the same day, the Wisconsin Supreme Court issued an order denying the petition. The response to Father Groppi's federal petition was filed on the following day, Saturday, October 11, 1969, and petitioner was admitted to bail by the District Court within hours thereafter.

Petitioner remained free on bail until April 8, 1970, when he was discharged from custody on the order of the District Court. His challenge to the constitutionality of the statutes under which the Wisconsin Assembly had acted (secs. 13.26 and 13.27, Wis. Stats. 1967) was rejected the same day by a three judge district court. (*Groppi v. Froehlich*, W. D. Wis. 1970, 311 F. Supp. 765)

Respondent appealed from the judgment in *habeas corpus*, and on October 28, 1970, the Court of Appeals for the Seventh Circuit reversed. Following an *en banc* rehearing,

the earlier reversal was upheld, three judges dissenting, on January 6, 1971. The regular 1969 session of the legislature of Wisconsin had ended two days earlier, on January 4, 1971, terminating all threat of petitioner's imprisonment under the contempt resolution.

ARGUMENT

The petition paints the decision of the Court of Appeals in lurid colors, claiming it represents a radical departure from traditional notions of due process and a new grant of despotic power to the legislative branch.

There has been no departure, and no new power has been granted. The Court of Appeals was merely willing to recognize what the District Court could not: that a legislative body must have—and always has had—the power possessed by all courts to impose summary punishment for an act of disruptive contempt committed in its immediate view. That petitioner may have been unaware of the existence of this power does not make its exercise unconstitutional.

To achieve a better perspective of the narrow issue involved in this controversy, it should be kept firmly in mind that:

1. Both the District Court and the Court of Appeals recognized—and petitioner has not disputed—that the Wisconsin Assembly is a house having authority to commit for contempt.

2. The District Court expressly acknowledged that if the conduct described in the contempt resolution "had occurred in a courtroom in the presence of a judge" summary punishment for contempt would have been permissible under the Constitution. (Appendix pp. 29-30)

3. Among the many courts which have heretofore recognized and upheld the contempt powers of legislative bodies (see cases collected in *Jurney v. MacCracken*, (1935) 294 U. S. 125, 79 L. ed. 802, 55 S. Ct. 375), not one has ever suggested that those bodies should be less able than courts to act expeditiously in vindication of their legally vested authority when that authority is challenged by physically disruptive conduct in the immediate view of the house.

Seen in this perspective, the decision of the Court of Appeals, carefully limited as it was, was clearly correct.

Petitioner's claim of a vague "right to be heard" or "right of allocution" prior to commitment for a *direct* contempt is not supported by the citation of a single contempt case. Not *one* of the 12 cases cited at pages 8-9 of the Petition for Certiorari holds that there is a constitutional right to hearing or allocution in cases of contempt committed in the face of a tribunal having power to commit.

The petition ignores, on the other hand, language in decisions of this court which has invariably recognized the necessity for and propriety of summary punishment under certain well defined circumstances: *Ex Parte Terry*, (1888) 128 U. S. 289, 32 L. ed. 405, 9 S. Ct. 77; *Ex Parte Hudgings*, (1919) 249 U. S. 378, 63 L. ed. 656, 39 S. Ct. 337; *Cooke v. United States*, (1925) 267 U. S. 517, 69 L. ed. 767, 45 S. Ct. 390; *In Re Oliver*, (1948) 333 U. S. 257, 92 L. ed. 682, 68 S. Ct. 499; and *Fisher v. Pace*, (1949) 336 U. S. 155, 93 L. ed. 569, 69 S. Ct. 425.

Respondent concedes—as it always has conceded—that a contempt committed *outside* the presence of a court or other tribunal is punishable only after notice and hearing. Indeed, all of the reported cases of congressional contempts appear to have been indirect, save possibly one—*Ex Parte Nugent*,

(1848) Brunner, Col. Cas. 296, Fed. Cas. No. 10,375—where the court acknowledged the power of the Senate to pronounce a judgment of contempt while in secret session, the report of the decision being silent as to whether the contemnor was given an opportunity "to be heard."

The Court of Appeals correctly refused to find an abridgment of petitioner's constitutional rights from the circumstance that the Wisconsin Assembly did not condemn until Wednesday an act of contempt committed on Monday. Certainly the Assembly could not be expected to act on September 29, 1969 while its chambers were occupied by petitioner and his followers. There is nothing in this record to suggest that the Assembly was *able* to organize and conduct business any sooner than it did, on October 1, 1969, or that the interval between the ending of the contumacious conduct and the adoption of the contempt resolution constituted unreasonable delay.

Mayberry v. Pennsylvania, (1971) — U. S. —, 27 L. ed. 2d 532, 91 S. Ct. 499, is not authority for the proposition that a 48-hour delay between contempt and judgment is fatal. The mere passage of time, it is submitted, has never been held to bar summary imposition of sanctions for direct contempt. *Sacher v. United States*, (1952) 343 U. S. 1, 96 L. ed. 717, 22 S. Ct. 451; *Ex Parte Terry*, (1888) 128 U. S. 289, 32 L. ed. 405, 9 S. Ct. 77; *In Re Maury*, (9 Cir. 1913) 205 F. 626.

Subsequent to the filing of Circuit Judge Kiley's dissent following the *en banc* rehearing in the Court of Appeals, petitioner has seen fit to suggest—for the first time—that the contempt resolution was constitutionally infirm because of an inadequate statement of "underlying facts." It is difficult to understand how a resolution which recites that

> ". . . James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10, prevented the Assembly from conducting public business and performing its constitutional duty. . ."

could reasonably be said to set forth only a legal conclusion. It is perhaps enough of an answer to petitioner to note that neither the District Judge nor six of the seven Circuit Judges felt the resolution was insufficient in its recital of the facts. In any event, however, the only case which has heretofore examined this question held that "the warrant of commitment need not set forth the particular facts which constitute the alleged contempt." *Ex Parte Nugent*, (1848) Brunner, Col. Cas. 296, Fed. Cas. No. 10, 375.

The issues sought to be raised by petitioner are more interesting than important. Legislative contempts of the variety here under discussion are historical rarities, if the paucity of cases is any fair indication. This is particularly true where, as here, the contempt was "direct"—i.e., disorderly conduct committed in the immediate view of the legislative body which pronounced the judgment of contempt. It is unlikely, therefore, that the well-being of the republic or the safeguarding of individual rights rests to any considerable degree on the resolution of these issues.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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